Neutral Citation Number: [2023] EWHC 1559 (Comm)

Case No: CL-2020-000819

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26/06/2023

Before :

LIONEL PERSEY KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

FINSBURY FOOD GROUP PLC

Claimant

- and -

(1) AXIS CORPORATE CAPITAL UK LIMITED
(as corporate member of Axis Syndicate 1686 at Lloyd's)
(2) NAVIGATORS CORPORATE UNDERWRITERS LTD
(as corporate member of Navigators Syndicate 1221 at Lloyd's)
(3) CANOPIUS CAPITAL TEN LIMITED
(as representative underwriting member of Canopius Syndicate 4444 at Lloyd's)
(4) MARKEL CAPITAL LIMITED
(as corporate member of Markel Syndicate 3000 at Lloyd's)
(5) ENDURANCE CORPORATE CAPITAL LIMITED
(as corporate member of Endurance Syndicate 5151 at Lloyd's)
(6) RENAISSANCERE CORPORATE CAPITAL (UK) LTD
(as corporate member of RenaissanceRe Syndicate 1458 at Lloyd's)
(7) HISCOX DEDICATED CORPORATE MEMBER LIMITED
(as representative underwriting member of Hiscox Syndicate 33 at Lloyd's)

Defendants

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Roger Stewart KC and Anthony Jones (instructed by **Fenchurch Law**) for the **Claimant**
Daniel Shapiro KC, Caroline McColgan and Hamish Fraser (instructed by **DAC Beachcroft LLP**) for the **Defendants**

Hearing dates: 1, 2, 4, 14-18 and 21-22 November 2022

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Approved Judgment

Lionel Persey KC :

Introduction

1. Over recent years there has been an ever-increasing demand for gluten free ("**GF**") bread and other products that are free from ("**FF**") gluten, nuts and dairy. The making of GF bread is not straight-forward. It is more expensive to manufacture than ordinary bread. It also commands a premium price.

2. Ultrapharm Limited (**"Ultrapharm"**) is a specialist manufacturer of GF baked goods, with its chief business in the UK being the supply of GF goods to Marks and Spencer plc ("**M&S**") which goods were sold under M&S' own brand. This case involves a claim by Finsbury Food Group Plc ("**Finsbury**") against the Defendant insurers ("**Underwriters**") under a Buyer-Side Warranty and Indemnity Insurance Policy HG18WI113926 ("**the Policy**") issued on 31 August 2018. The Policy was issued in connection with the sale and purchase of Ultrapharm by the shareholders of Ultrapharm to Finsbury pursuant to a Sale and Purchase Agreement ("**SPA**") that was also dated 31 August 2018.

3. Finsbury claims that Ultrapharm breached warranties in the SPA that had been provided by its CEO, Mr Marc Lewis, and that these breaches of the warranties are covered by the terms of the Policy. Finsbury contends that this reduced the overall value of Ultrapharm's business by £3,194,370. Underwriters say that the claim is contrived, and that Finsbury knew that it did not have a good claim before it commenced these proceedings.

The relevant companies

4. Finsbury is a group of food manufacturing companies, including various bakery businesses, which it manages within its Beard and Morning Goods ("**BMG**") section. Finsbury had developed an FF bakery business in 2005 with its acquisition of United Central Bakery and in 2008 Yorkshire Farm Bakery & A&P Foods (Livwell). These acquisitions were developed into a joint venture with Genius FF brand. In 2013 Finsbury sold its share in the FF joint venture to Genius, and Genius thereby acquired the Finsbury FF business and manufacturing sites. Finsbury continued to sell and distribute Genius FF products in the UK and also sold and distributed the FF products of Genius and other manufacturers, including Ultrapharm, via its European subsidiary, Lightbody Europe. It did not, however, have a GF bakery of its own.

5. Ultrapharm was, prior to its sale to Finsbury, an own-label manufacturer of GF speciality bread and bakery products. Its head office and UK bakery was in Pontypool, and it also had a manufacturing facility in Poland. Ultrapharm was owned by Mr and Mrs Lewis and their son, Marc Lewis.

The SPA Warranties and Policy Terms

6. The Accounts Date is stipulated to be 31 December 2017 in paragraph 1.1 of the SPA. Schedule 4, Part 3, paragraph 2 of the SPA provides as follows:-

> "… 2 **CHANGES SINCE THE ACCOUNTS DATE** [i.e., 31 December 2017]
>
> 2.1 Since the Accounts Date:
>
> 2.1.1 the business of each of the Group Companies has been carried on in the ordinary and usual course and in the same manner as in the 12 months period preceding the Accounts Date and without any interruption or alteration in the nature, scope or manner of its business;
>
> 2.1.2 there has been no material adverse change in the trading position of any of the Group Companies or their financial position, prospects or turnover and no Group Company has had its business, profitability or prospects adversely affected by the loss of any customer representing more than 20% of the total sales of the Group Companies or by any factor not affecting similar businesses to a like extent, other than as a result of factors which have affected businesses in the same industry, in general and so far as the Warrantor is aware, there are no circumstances which are likely to give rise to any such effects; [**the 'Trading Conditions Warranty'**]
>
> …
>
> 2.1.9 no Group Company has offered or agreed to offer ongoing price reductions or discounts or allowances on sales of goods relating to its business or any such reductions, discounts or allowances that would result in an aggregate reduction in turnover of more than £100,000 or would otherwise be reasonably expected to materially effect [sic] the relevant Group Company's profitability; [**the 'Price Reduction Warranty'**]
>
> 2.1.10 no Group Company has entered into any commitment, conditional or otherwise, to do any of the matters set out in paragraphs 2.1 to 2.19 (inclusive) ..."

7. Schedule 6 of the SPA also provided for limitations of liability in respect of the warranties offered. Insofar as material Schedule 6 provided:

> "… 9 BUYER KNOWLEDGE
>
> The Warrantor will not have any liability in respect of any Warranty Claim to the extent that the Buyer as at the date of this Agreement had (i) actual knowledge of the circumstances of such Warranty Claim and (ii) is actually

aware that such circumstances would be reasonably likely to give rise to a Warranty Claim. For the purposes of this paragraph 9, the knowledge of the Buyer shall be limited to such facts, matters or circumstances in the actual knowledge of Steve Boyd, Julie Turnbull and Jas Randhawa ...” [**the ‘Knowledge Exception’**]

8. At the same time as entering into the SPA, Finsbury insured the sellers’ liability under the SPA for, among other things, breaches of the warranties set out above. The insurance was pursuant to a Buyer-side Warranty and Indemnity policy, underwritten by the Defendant insurers.

9. The Policy provided that the Defendants would, subject to relevant limits, indemnify Finsbury for any Loss covered by the Policy:

(1) ‘Loss’ is defined in Clause 4.1 as including “… the amount of monies which [Finsbury] is legally entitled to claim against the Sellers and/or the Warrantor pursuant to the Transaction Documents [including the SPA] for a Breach or would be entitled to claim in respect of such Breach if the Limitation Provisions were disregarded …”

(2) ‘Actual Knowledge’ is defined in Clause 1.1 as “… actual personal knowledge of the relevant person and for the avoidance of doubt does not included constructive or imputed knowledge of the relevant person nor does it include any actual, constructive or imputed knowledge of any director, officer, employee, advisor or agents of the Insured (save in their capacity as Transaction Team Member) nor the information provided by such advisors or agents of (i) the Insured or (ii) of the relevant person …” and

(3) ‘Breach’ is defined as including breach of clause 7.2 of the SPA in respect of the General Warranties which included those relied on in this case.

10. The Defendants’ obligation to provide indemnity was subject to exclusions including the following:

“… 5 Exclusions

5.1 Known issues

5.1.1 The Underwriters shall not be liable to pay Loss to the extent that it arises out of any Breach in respect of which any Transaction Team Member [i.e. Mr Boyd, Ms Turnbull, and/or Mr Randhawa] had Actual Knowledge prior to the Commencement Date.

5.1.2 The Underwriters shall not be liable to pay any Loss to the extent that it arises out of any Breach which has been Disclosed in the following documents and, in each case, in a manner so as to cause a Transaction Team member to have Actual Knowledge of a Breach;

5.1.2.1 the Transaction Documents;

5.1.2.2 the Disclosure Letter;

5.1.2.3 the Due Diligence Materials;

5.1.2.4 the Data Room …” [the ‘**Knowledge Exclusion’**]

The Issues

11. Finsbury identified the issues as follows in their written opening:-

(1) The meaning of the Trading Conditions Warranty, in particular what is meant by the description "material adverse change in the trading position of any of the Group Companies or their financial position, prospects or turnover" and what is required for the change to occur "[s]ince the Accounts Date";

(2) Whether or not the Recipe Change agreed between Ultrapharm and M&S for the Products to go on sale in M&S stores from 2 January 2018 breached the Trading Conditions Warranty, as properly construed;

(3) Whether or not the Price Reductions offered by Ultrapharm to M&S in respect of those same Products breached the Trading Conditions Warranty, as properly construed;

(4) The meaning of the Price Reduction Warranty, including what is meant by the description "ongoing price reductions or discounts or allowances on sales of goods relating to its business or any such reductions, discounts or allowances that would result in an aggregate reduction in turnover of more than £100,000 or would otherwise be reasonably expected to materially effect [sic] the relevant Group Company's profitability" and what is required for an offer or agreement to offer price reductions "[s]ince the Accounts Date";

(5) Whether or not the Price Reductions offered by Ultrapharm to M&S breached the Price Reduction Warranty, as properly construed;

(6) If any of the warranties were so breached, whether the relevant individuals at Finsbury (Mr Boyd, Ms Turnbull, and/or Mr Randhawa) had the requisite Actual Knowledge so as to:

(a) Excuse the sellers' liability for breach of warranty under the Knowledge Exception in the SPA; or

(b) Exclude the Defendants' obligation to provide indemnity under the Knowledge Exclusion in the Policy;

(7) What the *as warranted* value of Ultrapharm was at the time of its purchase on 31 August 2018 (and whether the purchase price of £20 million reflected that warranted value or was an overpayment). The disputes between the parties are: (a) precisely what the 'run-rate/maintainable' EBITDA value should be; and (b) what multiplier should be applied;

(8) What the *actual* value of Ultrapharm was at the time of its purchase on 31 August 2018, and thus what Finsbury's loss on the purchase (the difference between the warranted and actual value) is. The disputes in relation to the calculation of the actual value relate to: (a) how expected increases in sales volumes should be taken into account in determining the 'run-rate/maintainable' EBITDA; and (b) what figures should be relied upon in calculating the effect of the Price Reductions and Recipe Change;

(9) Whether, if there is a loss on the purchase, Finsbury is responsible for that because it would have purchased Ultrapharm for £20 million even if it had known that its actual value was less?

12. Underwriters framed the issues somewhat differently. I consider, however, that Finsbury's list is more than sufficiently comprehensive for the purposes of this judgment although I will consider their issue 9 ahead of their issues 7 and 8.

The evidence

13. The factual evidence comprised the disclosure given by Finsbury and the written and oral evidence given by their six factual witnesses.

The disclosure

14. The trial started on 31 October 2022. In their written opening, having set out the history of Finsbury's disclosure failures, Underwriters submitted that at the point of trial neither they nor the Court could have any confidence that Finsbury's disclosure was complete. Finsbury acknowledged in their written opening that there had been some substantial grounds for criticism in relation to some of the complaints about disclosure that had been made and they referred me to an apology that had been given by Mr Corman, a partner in Fenchurch Law LLP, in a letter to DAC Beachcroft LLP dated 5 April 2022 referred to in his second witness statement on 13 June 2022. I was then told during the course of Finsbury's oral opening that a further 4 relevant documents had just been disclosed by them and that it was suspected that there might be more. I adjourned the trial to recommence on 7 November 2022 and made orders for disclosure. It became apparent that the scope of the undisclosed documents was wider than had first been appreciated and, in the event, the recommencement of the trial was delayed until 14 November 2022. I ordered that all of the costs caused by Finsbury's disclosure during the trial and the consequent adjournments of the trial were to be paid by Finsbury to Underwriters on the indemnity basis.

15. Some 2,000-2,200 further documents were disclosed by Finsbury after the trial had commenced. I am satisfied that a number of these are directly relevant to the issues in the case. Fenchurch Law have accepted that the shortcomings in the disclosure process were their responsibility. They ascribe them to (a) a failure to properly instruct the paralegals who carried out the initial disclosure on the issues in the case, and then (b) to a failure of the subsequent Technology Assisted Review ("**TAR**") to discover many relevant documents because the Training Set of documents skewed the TAR from finding relevant documents outside the August-September 2018 range and towards those issues which the paralegals had thought were key and away from those that they had incorrectly not considered to be relevant.

16. This was profoundly unsatisfactory. Fenchurch Law's whole approach to disclosure fell far below that which was required. The initial discovery should not have been left

to paralegals who had no real understanding of the issues in the case. The Training Set for the TAR should have been properly prepared and directed towards the full range of issues. It was fortunate that the Court and the parties were able to accommodate a later hearing date to enable the disclosure to be properly carried out.

The witnesses of fact

17. Finsbury called six witnesses of fact to give evidence. They each signed witness statements in an almost identical format. In each they listed a short number of documents that they had been asked to consider. The statements covered a very selective and limited number of matters. I was not assisted by them.

18. *Mr John Duffy*. He is Finsbury's CEO. I formed the impression that he is a highly intelligent and clearly capable businessman. His evidence, however, was far from satisfactory. His answers to questions were very lengthy, often avoided the point, and on occasion obfuscated rather than addressed the issues. This, in my view, was deliberate.

19. *Mr Simon Staddon.* He is the Managing Director of the Bread and Morning Goods division at Finsbury. I thought that he gave his evidence reasonably well, although it was very much in accordance with Finsbury's case. His evidence rather fell apart, however, when he was asked about an email that he had sent to Mr Boyd on 14 August 2018 in which he had quite clearly raised an issue about the purchase price that Finsbury were prepared to pay. His evidence that this was purely opportunistic was unreal.

20. *Ms Julie Turnbull.* She was the Finance Director of the BMG division of Finsbury. Her main responsibility in relation to the acquisition of Ultrapharm was to manage the due diligence ("**DD**") process. She also played a significant role in investigating matters after the purchase of Ultrapharm had been completed. She came over from the contemporaneous documents as a thoroughly competent and fearless person and as one who was prepared to express her views and to stand by them. She accepted in her oral evidence that parts of her witness statement were wrong and said that they were based upon those documents that Fenchurch Law had picked out for her. Although she is no longer employed by Finsbury and said that she had no reason to lie for them I nevertheless found some aspects of her oral evidence to be incorrect. She said in evidence that she had agreed to assist Finsbury as part of her severance package.

21. *Mr Stephen Boyd.* He is the Group Finance Director of Finsbury and was a key witness. He was belligerent, did not accept much of that which was put to him, even where it ought not to have been controversial. I formed the view that he was very much the brains behind the purchase of Ultrapharm initially and the formulation of this claim thereafter. His evidence was unreliable.

22. *Mr Jas Randhawa.* He is a business director at Finsbury. His evidence was central to important issues in the case. Although he is clearly competent in his field I found him to be a most unsatisfactory witness. He was intent on sticking to and repeating the contents of his witness statement even when shown documents that contradicted what he had said in it.

23. *Mr David Chu.* He is a chartered accountant who was employed by Finsbury to assist on project work. He no longer works for them. Although his written evidence was in many respects inaccurate the first part of his oral evidence was given well and accorded with the facts. After the break, however, there was a sea change in his answers to questions. These were then largely directed to supporting Finsbury's case and were, I consider, incorrect in a number of respects.

24. *Mr Lewis Stacey.* He is a Supply Chain Manager employed by Ultrapharm although his responsibilities extend well beyond his job title. He gave his evidence well. I do, however, have reservations about some of the answers that he gave in relation to the data that he had provided to Mr Chu in the spreadsheet and planning boards. He said in his witness statement that he could not recall having a discussion about these with Mr Chu or anyone else at Finsbury and yet told me that he had discussed it with Mr Chu although had no memory of discussions with Mr Randhawa.

25. It will be apparent from the above that much of the written and oral evidence of those witnesses called to give evidence on Finsbury's behalf was unreliable. I do not accept it, except where it accords with the contemporaneous documents or the inherent probabilities.

The expert evidence

26. Expert witnesses were called by the parties to address the quantum of Finsbury's claim. Mr Sat Plaha of BDO wrote two reports and gave evidence on behalf of Finsbury. Ms Catherine Rawlin of Baker Tilly wrote four reports and gave evidence on behalf of Underwriters. They are both forensic Chartered Accountants and are both eminently well qualified to advise on the matters with which they were instructed to deal. I found, however, that Mr Plaha was prepared to make assumptions in favour of Finsbury when the evidence did not always justify him in so doing. Ms Rawlin gave her evidence well.

Factual narrative

27. The parties agree that the facts of the present claim are to be found in the documents. My findings below depend largely on these, supplemented where appropriate by the oral evidence.

28. In 2015 Finsbury engaged Stamford Associates Limited ("**Stamford**"), a firm of investment consultants, to prepare a review and analysis of its corporate development

options. This was known as "Project Maia". Stamford's Project Maia report was presented to the Board of Finsbury on 25 November 2015. It advised Finsbury to re-enter the GF market. Stamford considered that Finsbury was trading significantly below where it should be, that the bread market risked erosion due to consumption decline and increasing consumer concern about gluten, and that Finsbury should focus on investments and acquisitions in the fast-growing FF market. Finsbury's Board accepted that advice, and thereafter sought to re-enter the GF market either through (i) acquisition; or (ii) the development of its own GF manufacturing capacity by building a GF bakery in Gwent, Cardiff ("**Gwent**") to manufacture GF products. It is not clear how far Finsbury got with developing Gwent, although it certainly was not operational by the time Ultrapharm was acquired. A significant benefit to buying Ultrapharm was the acquisition of recipes, knowhow and bakers, to facilitate the operation of Gwent.

29. Finsbury first came into contact with Ultrapharm in 2016 when it started to sell Ultrapharm's GF products in Europe through its distributor, Lightbody Europe. Mr Boyd says that Finsbury considered Ultrapharm's bread products to be the best tasting GF bread on the market and that Finsbury became interested in acquiring Ultrapharm, along with its recipes and technical knowhow, in line with its growth strategy of re-entering the GF market. In late 2016 Mr Boyd had a meeting with Marc Lewis to discuss Finsbury's interest in purchasing Ultrapharm. The meeting came to nothing.

30. In April 2017 Finsbury made a written proposal to Ultrapharm in which they offered to acquire a 25%-33% stake in Ultrapharm for a multiple of 1 x Current Net Sales (pro rata) to be audited. This proposal further provided that the 1 x sales formula would be the basis for Finsbury to acquire a majority 51%, and up to a 100%, stake over a 3-year period.

31. On 26 June 2017 Mr Boyd and Mr Duffy visited Ultrapharm's premises at Pontypool to meet with Marc Lewis and Frank Holmes of Gambit Corporate Finance ("Gambit"), a corporate finance advisory firm, in order to discuss the proposal. A valuation of £20m for the business was proposed and agreed on. The valuation of £20m agreed in June 2017 did not at any point change during the 14-month acquisition process, including when the proposed deal changed to an outright acquisition. £20m was agreed upon because that was the value demanded by the Lewis family. It was derived or supported, according to all of the documentary evidence before me, based on 1 x current sales. Notwithstanding this Mr Boyd and Mr Duffy both gave evidence to the effect that on 26 June 2017 Finsbury had proposed a valuation of the business of £20m by applying a 10x multiple to an EBITDA (earnings before interest taxes, depreciation and amortization) of £2m. I reject this evidence. Mr Duffy said in evidence that Mr Boyd would never make a valuation of a business in this sector based on a sales multiple alone. That, however, is just what Finsbury did.

32. In early September 2017 Ms Turnbull prepared a draft basis for the acquisition proposal, called the Project Sherlock Outline and Information Request. The proposal was that Finsbury would *"*acquire a minority stake of 33%* for a multiple of 1x audited current net sales, on a pro-rata basis. E.g. £20m net sales x 33% = £6.66m" along with call or put options for the remaining 66%. Under the benefits for Finsbury, FF was identified as an "obvious missing part" of Finsbury's business which the acquisition of Ultrapharm would remedy.

33. Mr Boyd subsequently amended the proposal to reflect what Marc Lewis had said at the meeting so as to alter the deal structure to an acquisition of all the issued share capital of Ultrapharm. Mr Boyd then sent the proposal to Marc Lewis and Gambit on 8 September 2017. The proposal provided that Finsbury would "acquire all the share capital for a multiple of 1x audited current net sales, on a pro-rata basis. E.g. £20m". Mr Boyd suggested in his covering email that there would only need to be "light touch" financial and operational due diligence requirements in order to assuage the concerns of Marc Lewis. Finsbury was not concerned with carrying out a rigorous due diligence process.

34. During 2017, Ultrapharm agreed and implemented Recipe Changes and also agreed Price Reductions with M&S.

35. Ultrapharm was continually adjusting and improving its recipes, it would appear with input from M&S. It also appears that M&S were highly protective of the recipe. At a meeting with Mr Boyd and Mr Duffy in July 2018 prior to acquisition M&S wanted "re-assurance on the protection of **<u>their</u>** recipe", stated that "**<u>their</u>** Free From bread recipe [was] market leading" (emphasis added), and pointed out they had *"*invested a lot of time into developing this recipe themselves." The particular Recipe Change which is the subject of this dispute had been agreed between Ultrapharm and M&S by June 2017.

36. In December 2017 Ultrapharm prepared to manufacture according to the new recipes for the GF seeded loaf ("**GF Seeded**") and the GF White loaf ("**GF White**") (together "the **Products**") agreed with M&S in June 2017. On 6 December 2017 M&S emailed Ms Dot Sierpowska, Product Innovation Manager at Ultrapharm, to confirm that the following Monday (11 December) would be suitable for pre-production trials of the products which it would be launching in January. Ms Sierpowska replied that the pre-production trial would have to be delayed as a number of the necessary ingredients had not arrived. She advised, however, that the ingredients had all already been ordered and would largely be delivered by 14 December, with the last by 20 December. On 22 December 2017 Ultrapharm emailed M&S to confirm a draft agenda for the pre-production trials of products, including GF Seeded and GF White, on the following day. On 28 December 2017 M&S attended Pontypool to observe the trial pre-production of new recipe GF Seeded and GF White. This was a success and the new recipe GF Seeded and GF White were green-lit for manufacture. M&S had

already produced and provided packaging for the new recipe products, which described the products as being a "NEW Recipe".

37. It is common ground that Ultrapharm's records of production, mixing, proving, slicing, and packaging from this period are significantly defective. Nevertheless, those records which have been produced show that: (i) the new recipe for GF Seeded was issued on 27 December 2017. GF Seeded was being manufactured according to the new recipe by at least 30 December 2017; and (ii) the new recipe for GF White was issued on 29 December 2017, and manufacture in accordance with the new recipe began on the same day and continued on 30 December.

38. In accordance with paragraph 4.3 of the terms of sale agreed between Ultrapharm and &S ("the **M&S Terms**"), each order submitted by M&S constitutes an offer which is accepted by Ultrapharm upon either (a) Ultrapharm providing written acknowledgement of the offer; or (b) failing such acknowledgment, the earlier of (i) 24 hours after the submission of the order by M&S or (ii) Ultrapharm doing any act consistent with fulfilling the order. Once an order is accepted it is automatically binding as a standalone contract. According to these terms, at the latest by 29 December 2017 for GF White and by 30 December 2017 for GF Seeded, a binding contract had been formed between M&S and Ultrapharm for the supply of bread baked to these new recipes.

39. Finsbury's pleaded case is that the Price Reductions to GF Seeded and GF White were also agreed in about October 2017. Finsbury has not disclosed any documents which evidence the alleged agreement of the Price Reductions, on what terms they were agreed, or why. None of Finsbury's witnesses gave evidence on the point.

40. According to Finsbury, the first Price Reduction was implemented on 16 January 2018 and the second Price Reduction on 29 April 2018. Ultrapharm's Sage Accounting records disclosed by Finsbury show that the price of the Products reduced in two phases on different dates: on 5 February 2018 and on 30 April 2018. The starting price was that GF Seeded was sold for £1.80 per loaf and GF White was sold for £1.78 per loaf. On 5 February 2018 the GF Seeded price was reduced by £0.08 to £1.72 per loaf and the GF White price was reduced by £0.06 to £1.72 per loaf. On 30 April 2018 both Products were reduced by a further £0.14 to £1.58 per loaf.

41. On 18 January 2018, Mr Duffy, Mr Boyd, Mr Lewis and Gambit met in order to discuss an Investment Opportunity Report that Gambit had prepared. Gambit, on behalf of Mr Lewis, gave the following financial information for Ultrapharm:

(1) Year Ending ("**YE**") 31.12.17, based on 11 months actual figures and forecast figures for December: Revenue £19.38m, EBITDA £1.75m;

(2) April 2018 LTM Forecast figures of: Revenue £20.15m and EBITDA £1.93m; and

(3) YE 31.12.18 forecast: Revenue £23.2m, EBITDA £2.4m.

Gambit proposed that the price for Ultrapharm should be the previously agreed £20m, requesting £18m as initial consideration plus £2m deferred consideration.

42. In about January 2018 Finsbury engaged Stamford as their advisors for the acquisition. Stamford was sent Gambit's Investment Opportunity Report. Their initial reaction was to observe on 17 January 2018 that "… looking at the numbers, but without knowing the business in detail, [our] initial view would be your initial offer looks generous but not overly so …"

43. At around the same time, Finsbury was considering whether also to acquire another FF business, NFF, for £25m. Stamford's view was that NFF would probably "pay for itself on announcement", particularly if bought alongside the purchase of Ultrapharm as a move by Finsbury into the growth areas of GF and FF. Peter Baker, Chairman of Finsbury, agreed that acquiring both companies in the high growth GF area would be positive. It was submitted by Underwriters, and I agree, that these emails are indicative of Finsbury's and its advisors' view that the price of the companies was less relevant than the public relations slant and boost to Finsbury's perceived value that acquisitions in the GF market would provide. The acquisitions would boost Finsbury's market value, which was perceived as being low compared to its peers.

44. On 22 January 2018 Gambit provided a presentation to Marc Lewis and his parents to assist in Ultrapharm's appraisal of the £20m acquisition offer. Gambit's presentation recognised that the Lewis family wanted £20m for Ultrapharm and confirmed that the "Sherlock offer is **based on projected turnover** and provides an Enterprise Value of £20 million" (emphasis added). That is only consistent with Finsbury valuing Ultrapharm on a Multiple of Revenue ("**MoR**") basis. Gambit warned, however, that, although the £20m was based on an MoR valuation, the "market is likely to value the business on a multiple of EBITDA". Gambit suggested an EBITDA multiple of 7x based on their experience and research. Gambit put EBITDA at around £1.45m, on which basis an MoE valuation would be £10.15m. Gambit's presentation said that a value of £20m could only be justified on a projected turnover basis. It suggested that Finsbury's offer was indeed generous.

45. On 19 March 2018 Iain Lewis (Marc Lewis' brother) reported to Gambit that Finsbury had decided to lighten the data gathering load significantly and to base the financial due diligence on the 2017 Audited accounts. On 31 March 2018 Ms Turnbull circulated to Mr Boyd and CMS Cameron McKenna LLP ("**CMS**"), the lawyers acting for Finsbury on the acquisition) a draft paper to be presented to the banks. The draft stated that Ultrapharm was being valued at £20m "reflecting a multiple of c1x current net sales".

46. By 8 April 2018 it was clear that Mr Marc Lewis was somewhat overwhelmed by, and also not very interested in, the acquisition process, telling Gambit, "… unless I get some help and support I am close to telling John Duffy the deal is off". On 5 April 2018 Iain Lewis had met with Ms Turnbull. In his update to Marc Lewis and Gambit

from the meeting he wrote that Ms Turnbull had told him "Finsbury are 'desperate' to get the deal done" and "would sign the cheque now if funding the deal themselves". Ms Turnbull did not accept that she had said this to Iain Lewis. I find, however, that she probably did. There is no reason why Iain Lewis would have made this up. Ms Turnbull reported back from the meeting to Mr Boyd and Mr Duffy that that she had "agreed that I would do as much as I can for the UK side… to reduce the amount that Marc will be required to do." I agree with the Underwriters' submission that Finsbury wanted Ultrapharm for the market leading recipes and entrance back into the GF market and that the exact financials were of lesser importance to them.

47. Ms Turnbull commented upon the amount of assistance and support she had offered Ultrapharm, saying "Again, this is unorthodox but if it helps to get the deal across the line it will be worth it". Mr Boyd agreed with Ms Turnbull's approach and Mr Duffy responded, "It is a little surreal us doing the work as well giving them the money but that's the attraction of an off market deal and hopefully gets it over the line". It is clear from the correspondence that enthusiasm for the deal was one-sided, with Finsbury spending time and resources trying to get it over the line, whilst Mr Marc Lewis, as Ms Turnbull reported to Mr Duffy/Boyd on 23.4.18, showed a "lack of engagement on the whole project" and generally was not seen to be invested in it. Iain Lewis put this down to an emotional response at letting the company go. On completion of the acquisition, Mr Marc Lewis' comment to his contact at M&S was that it was "a day of mixed emotions for me".

48. In order to encourage Mr Lewis further, Mr Boyd reduced the warranties in the draft Sale and Purchase Agreement ("**SPA**") to only the essential ones. He also reworded the warranties so that they only applied to more significant impacts on the business of Ultrapharm. Those changes were later adopted in the agreed SPA.

49. Mr Duffy said he trusted Mr Boyd implicitly to get the level of materiality on deals correct. The words inserted by Mr Boyd plainly reflect the materiality threshold that Mr Boyd considered relevant to the deal. Mr Boyd's comment when his amendments were put to him in cross-examination was that he was "thinking, what level would Finsbury really have a problem with bearing a loss and what would Finsbury be prepared to accept? So getting the materiality threshold is what I'm thinking about" and later that he was thinking "if there was – something that happened that came home – that came home to Finsbury, what would [we] be happy to bear versus what would we be not happy to bear".

50. Just like the 'light touch' due diligence and support provided by Ms Turnbull, Mr Boyd's amendment to increase the warranty limits was a commercial decision made in order to protect Mr Lewis and make the acquisition more attractive given his levels of enthusiasm were apparently low. Setting the materiality threshold on the basis of group sales was also consistent with agreeing the purchase price as a multiple of sales and consistent with the fact that the real value in Ultrapharm was in the recipe and knowhow rather than purely the financials.

51. By July 2018, the limited financial due diligence that Finsbury had carried out suggested to them that the UK side of the Ultrapharm business at the Pontypool site was underperforming. On 16 July 2018 Julie Turnbull circulated an updated version of the draft paper for the Finsbury Board and to be sent to the banks. The draft stated that Finsbury's strategy was to exploit the quality credentials and technical expertise of Ultrapharm and to use Finsbury's Gwent facility to unlock further growth. The tables of financial information for Ultrapharm's Pontypool and Poland sites showed that Finsbury was now predicting EBITDA at the Pontypool site to fall from £0.9m in December 2017 to £0.5m in December 2018, before staying at £0.6m for 2019-2020. The EBITDA for Ultrapharm Poland was instead predicted to steadily increase from £1.0m in December 2017 to £2.0m in December 2020.

52. Mr Duffy expressed his concern over Pontypool's profitability to Mr Boyd on 17 July 2018. Mr Duffy and Mr Boyd then met with Marc Lewis on 20 July 2018. Mr Duffy said that the purpose of this meeting was to discuss the acquisition and the decline in profitability of the Pontypool site. Mr Duffy and Mr Boyd's both said in evidence that Marc Lewis told them the decline in profitability was caused by operational inefficiencies following (i) changes in shift patterns, (ii) high levels of waste and (iii) increased wages. The documentary record prepared by Mr Boyd at the time records that Marc Lewis told them:

> "… M&S demand lower prices and healthier credentials. Healthier means more expensive ingredients, not sure about factory complexity… M&S moved the rolls business (quite recently) to Village. Reason = price… M&S are demanding improved health credentials in the Bread which currently entails more expensive ingredients and has an impact on factory output and efficiency …"

Mr Boyd's summary of the meeting did not focus on the operational difficulties and concluded instead that his view was that people and site management at both sites were and would be an ongoing issue.

53. It appears that Mr Duffy then started to get cold feet about acquiring the UK business. On 29 July 2018 he emailed Mr Boyd and Mr Staddon and raised the idea of buying the Ultrapharm Poland business in isolation with an option to buy the Pontypool site and business "when it is fixed… We can help try to turn it around but why take Marc's full Pontypool risk onboard now*"*. On 30 July 2017, Stamford provided Mr Duffy and Mr Boyd with a potential restructure to the deal which would involve Finsbury making an upfront payment of £12.5m for the Polish business on the basis of "1.3x LTM sales and c8x LTM EBITDA for Poland" and then making 3 deferred payments of up to £2.5m at the end of years 1-3, contingent on the performance of Pontypool. This proposal assigned no upfront value to the Pontypool business at all. The revised proposal was not pursued. This seems to be because Mr Boyd, who remained more positive about the acquisition, emailed Mr Duffy and Stamford on 31 July 2018 that:

(1) Any attempt to restructure the deal would be unacceptable to Marc Lewis and, if it was suggested, Mr Lewis would revert that there were "ups and downs, ups being Poland performance and opportunity, downs being Pontypool".

(2) Acquiring Ultrapharm would unlock Finsbury's Gwent site by providing "recipe and know how" whereas at the time they were spending capex on Gwent but had "no recipe, no know how" while "starting from scratch looks a tall order". Finsbury was a special purchaser: a significant part of the real value of Ultrapharm to Finsbury was in the recipes and technical knowledge that it would provide Finsbury's Gwent facility as opposed to the value being in the existing UK/Pontypool business.

(3) Finsbury was reasonably assured of having the M&S business for at least one year but even if the entire M&S business was lost, the acquisition was still worthwhile because they could sell the Pontypool facility and "*retrench*" to the lower cost facility at Gwent.

(4) The Polish development presented a big opportunity to grow out the business and margins quickly.

Mr Boyd concluded with the question "Is it time to be brave?". It is my impression from his message that he clearly thought that it was.

54. Mr Duffy responded, saying that Mr Boyd had made some good points regarding recipe and Gwent capex as well as the Polish upside and that they needed to discuss. I am satisfied that as at the time of this response Mr Duffy was not yet committed to a full purchase of Ultrapharm. Mr Duffy knew he could try to renegotiate and knew there were grounds to renegotiate because the EBITDA had fallen, and Stamford had identified a possible renegotiated structure.

55. The late disclosure provided Stamford's response to Mr Boyd's "*time to be brave*" email. Damian Thornton, who was the senior partner at Stamford, agreed with Mr Boyd, writing on 1 August 2018 that, "my reaction to your email is yes it is time to be brave". Mr Thornton said that "If your judgment is tinkering with the deal at all won't wash with Marc then I would be of the view you should do the deal rather than walk away." Mr Thornton continued:

> "... I say this both for the reasons you well articulate on the specific deal and also because Finsbury needs to do something to stimulate interest in the stock and remind investors that you're relevant. I suspect although quite expensive this deal in an area people will recognise as on trend and in areas you understand will be easy to explain and well received. Adding a Polish factory is helpful to a European expansion and Brexit story. How wrong can it be; you're not betting the ranch: time to be brave ..."

56. Mr Duffy was clearly persuaded, replying on 2 August 2018 "thanks for your feedback Damian, good challenge… We had a chance to discuss properly our end yesterday and agreed we will press on". I am satisfied that, as from that point, Finsbury had discussed the deterioration in EBITDA and were nevertheless committed to press on regardless. On 3 August 2018 Mr Boyd circulated version 14

of the Board Report to the Finsbury Board, which recommended the acquisition of 100% of Ultrapharm for the price of £20m. That was notwithstanding the deterioration in performance. Mr Boyd stated in the body of his email: "The financial performance of Ultrapharm is slightly lower than what we originally expected, the audited accounts showing an [actual] EBITDA of £1.8 million against the £2 million expectation. Run rate [EBITDA] is higher. We remain at £20 million". The reduction in actual EBITDA thereby had no effect on the price which Finsbury was willing to pay for the business.

57. The actual EBITDA was then adjusted down again from the £1.8m Mr Boyd had stated to the Board on 3 August. By 10 August Mr Boyd thought the actual EBITDA was £1.5m, some £300k lower than the £1.8m stated to the Board. On that day Ms Turnbull asked Stamford to assist with Mr Boyd's query that the audited accounts only showed an EBITDA of £1.5m. Stamford replied that the statutory accounts showed actual EBITDA of £1.7m for YE 2017 which was "not materially different" to the YE 2017 figure of £1.75m (based on 11 months' actual and one month's estimate) in the initial Gambit presentation.

58. On 14 August 2018 Mr Staddon emailed Mr Boyd asking whether it was too late to adjust the deal structure on the basis of a materially different actual EBITDA. No response to that email has been disclosed but on the following day, 15 August, Mr Boyd recommended to the Board at a Board Meeting that Finsbury proceed with the acquisition of 100% of Ultrapharm at the agreed price of £20m. Mr Boyd particularly noted that the acquisition was important to (i) Finsbury's strategy of moving into the GF market, (ii) equipping the Gwent facility with "recipe and production knowhow", and (iii) for Finsbury to become a bigger player in Europe. Ultrapharm's financials were reported to the Board as sales of £19.4m, EBITDA of £1.8m, and operating profit of £1.2m. The Board approved both the acquisition and the strategy outlined. Underwriters say that if the acquisition price was truly based on 10x EBITDA of £2m then an EBITDA of £1.8m ought logically to have resulted in a price of £18m. It did not, they submit, because that was not the basis on which the purchase price of £20m was arrived at. I agree.

59. Subsequent to the approval of the Board based on an EBITDA of £1.8m, the actual EBITDA was adjusted even lower in the course of an audit. On 15 August 2018 Iain Lewis provided an update informing Finsbury of a reduced EBITDA in the audited accounts. Stamford contacted Julie Turnbull asking her to update her report as it unfortunately looked like the underlying EBITDA was coming down further. Finsbury, however, made no attempt to reduce the price or even to ask Marc Lewis for any change in the deal notwithstanding the substantial decrease in EBITDA. I find that this was because the reality was that £20m was the price demanded, was the price which had been fixed from the beginning and was the price that represented the perceived value of Ultrapharm to Finsbury.

60. The decline in profitability and meeting with Marc Lewis on 20 July 2018 seems to have provoked Mr Duffy to suggest sending Mr Randhawa and Mr Chu to Pontypool to "review the turnaround plan to give us comfort, perhaps along with David Chu to pull the analysis together". On 24 July 2018 Mr Staddon met with Marc Lewis and they agreed (as Mr Duffy had suggested) that Mr Randhawa and Mr Chu would go to Pontypool in August 2018 as consultants to review and augment the 'turn-around plan' for Pontypool.

61. Mr Staddon briefed Mr Randhawa and Mr Chu on their role at the forthcoming meeting as involving the review of the credibility and likely results of Mr Lewis' current margin improvement plan, including understanding "the impact of the new M&S recipe due in Sept from the point of view of what price reduction, if any, has been agreed as part of this and its impact on the margin". In his statement Mr Staddon said that this related to the Greencore sandwich bread recipe. I was not satisfied that the statement is to be read in this limited way. It was to my mind a clear direction to Mr Randhawa to consider the margin and pricing of products. Mr Randhawa and Mr Chu were instructed to augment and improve Marc Lewis' existing turnaround plan. They knew there had been a decline in the profitability at Pontypool and that their task was to investigate why that had happened and draw up a plan to fix it.

62. Mr Staddon also said that they would be acting in the guise of consultants and that they would set up non-Finsbury email addresses so as not to reveal the true nature of their visit.

63. Mr Chu and Mr Randhawa met with Ms Sierpowska on about 2 August 2018 to discuss data and information. On 7 August 2018 Mr Chu emailed Mr Randhawa the first version of the Project Sherlock Analysis document, which was intended to form the basis of a presentation of their findings at Pontypool and their turnaround plan. The Analysis probably reflected information derived from Ms Sierpowska or which was already in Finsbury's possession. On 9 August 2018 Mr Randhawa emailed Marc Lewis stating that he looked forward to catching up and asking whether he could get David Chu in with Lewis Stacey on Monday to understand the data. It follows from the fact that Mr Randhawa wanted Mr Chu to look at the data that Mr Randhawa must also have been interested in it.

64. On 22 August 2018 Mr Chu and Mr Randhawa attended Ultrapharm's Pontypool premises for a meeting with Marc Lewis and Lewis Stacey. Mr Chu and Mr Randhawa set up in the Ultrapharm boardroom over the course of the two days. The late disclosure revealed that they were both at Pontypool from between just after 0900 until 1837 on 22 August and from just before 0900 until 1846 on 23 August 2018. Mr Randhawa told me that he was constantly interrupted by, and/or involved with, a variety of other matters and left the boardroom in order to deal with these. He did not mention this in his witness statement. I consider that this evidence sought to downplay the time that he spent in the boardroom with Mr Lewis and Mr Stacey, and I reject it.

65. Mr Chu said in his witness statement that Mr Randhawa opened the meeting by asking whether Mr Stacey or Mr Lewis knew why profits had deteriorated. Mr Chu further said that either Mr Stacey or Mr Lewis – he cannot remember which – responded to this question by informing them that two price reductions had been made, but that those price reductions had no effect on profitability because of a corresponding decrease in manufacturing costs. Mr Randhawa maintained in his witness statement that it was Mr Stacey who informed him of the Price Reductions, although at the time he said that it was Mr Lewis. Underwriters submit, and I agree, that Mr Randhawa would have been aware that a price reduction would reduce revenues in absolute terms and would also reduce the margin of the two products. Despite Mr Randhawa's task being to investigate margins at the business, both he and Mr Chu nevertheless denied in their witness statements that they probed or discussed the Price Reductions further. Mr Stacey, for his part, did not in his witness statement recall mentioning the Price Reductions.

66. As I have already mentioned, Mr Lewis has not given any evidence in this claim. It is, however, noteworthy that when the issue was raised with him by Finsbury (Mr Boyd) in December 2018 Mr Lewis insisted that he had absolutely shared the price decrease information with Mr Randhawa and Mr Chu when discussing the month-on-month position with them. I return to this further below.

67. At 1136 on 22 August 2018 Mr Chu sent an email from a Hotmail account to Mr Stacey, asking him to use that address for all correspondence. At 1211 Mr Stacey emailed Mr Chu the "Std Costs" Spreadsheet. This showed that there had been price reductions for GF Seeded and GF White from £1.74/£1.75 respectively to £1.58, i.e., the Price Reductions.

68. At 0814 on 23 August 2018 Mr Stacey emailed Mr Chu a second version of the "Std Costs" Spreadsheet. Mr Chu replied at 0900, raising a query about how the Spreadsheet was calculated. He wrote: "**we** are up in the board room again today so please feel free to pop in when you are free and **we** can go through again. Perhaps we can go through another costing in detail?" (emphasis added). It is apparent from this message that the "we" referred to both Mr Randhawa and Mr Chu. I agree with Underwriters' submission that this strongly suggests that both Mr Randhawa and Mr Chu had gone through the Std Costs spreadsheet with Mr Stacey on the previous day and would be in the boardroom and wished to "go through another costing".

69. Mr Stacey sent Mr Chu a variety of different documents from 0921 to 1325 on 23 August. Over the course of the two days, Mr Chu and Mr Randhawa were, I find, together in the Ultrapharm boardroom going through the material while investigating the business' margin and profitability problems. I consider it to be highly likely that Mr Randhawa went through the Std Costs spreadsheet and saw that there were price reductions to the GF Seeded and GF White products.

70. On 29 August 2018 Mr Chu emailed Mr Stacey and asked him to update the standard costing sheet that he had provided to add in further products which had been delisted. Mr Chu also sent Mr Randhawa an updated version of the Project Sherlock Analysis PowerPoint presentation. This identified that there were some challenges in connection with the commercial terms and recommended that price increases with M&S be held off due to competitor actions and historical Grain D'Or issues. Mr Chu claims that these comments were unrelated to the comments made at the meeting on 22 August 2018 or the information contained in the Spreadsheet. I find, however, that they suggest that, as is to be expected, he and Mr Randhawa did investigate and consider the pricing and price pressure upon Ultrapharm as part of their analysis exercise. A blank page was left in the Analysis for "*Standard costs / Margin*", presumably to cater for a subsequent analysis of the Standard Costs spreadsheet and the margins of the business.

71. Finsbury completed the Ultrapharm acquisition on 31 August 2018 and the SPA was concluded on that day. Finsbury's internal announcement described how the move would accelerate Finsbury's re-entry into FF production and that the acquisition was in line with its stated strategy of building the leading speciality bakery group, as well as diversifying Finsbury by both geography and category.

72. The acquisition met with a more negative reception from the City. The City did not greet the acquisition of Ultrapharm with the expected enthusiasm and there was no immediate improvement in sentiment around Finsbury. Mr Boyd reported on 20 September 2018 that the acquisition was received with caution and that there was a view that Finsbury had overpaid for the EBITDA stream. It seems that Finsbury was therefore concerned to ensure that Ultrapharm's earnings post-acquisition appeared strong, including by putting certain of Ultrapharm's overheads through the wider group, rather than offsetting them against Ultrapharm's profits as it ordinarily would.

73. In the meantime, Mr Randhawa, assisted by Mr Chu, continued to analyse Ultrapharm's performance, including using and relying on the Spreadsheet. That analysis is reflected in a deck of PowerPoint slides entitled Ultrapharm Project Analysis P which identified that there had been a decrease in Ultrapharm's gross margin ("**GM**") percentage ("**GM%**") from FY17 to FY18 in part as a result of the Price Reductions.

74. Although Marc Lewis remained Ultrapharm's de facto CEO, Mr Randhawa was tasked with turning Pontypool around. By the end of September 2018 Mr Randhawa was having difficulty delivering the improvements anticipated by the Stamford model. Mr Chu observed in Pontypool Analysis v.3 that:

> "… The Stamford model assumes an improvements in 2nd half of FY19 which sees the operating loss improving from £0.1m loss to a £0.4m profit by end of June 2019 … our conclusion is that the assumptions used in the Stamford model are extremely optimistic…"

75. On 10.10.18, only 6 weeks into Finsbury's ownership of its new company, Mr Duffy told Mr Boyd:

> "… Don't internalise Ultrapharm. We made a team decision to go for it **knowing the risks** and we are good in a crisis and we've got plenty of resources to throw at sorting it out … (emphasis supplied)*"*

76. While Finsbury's complaints in this litigation are about the Recipe Change and the Price Reductions, it is clear that Finsbury was struggling with operational factors (including in relation to the Polish business about which it had previously been very optimistic) and problems with recipes which generated significant waste. In a report dated 18 October 2018 Mr Boyd described Ultrapharm as:

> "… [a] tail [sic] of two halves; Poland ok **but margin focus needed**, Pontypool **much worse** than recent months. New shift patterns not appropriate and need to be reworked – not easy, waste high with hope due to new Greencore recipe but recipe in general needs effort as holes a significant cause of waste let alone the staff associated with loaf by loaf inspection … (emphasis supplied)"

77. Mr Randhawa and Mr Chu had been aware since 22 August 2018 of the Price Reductions to the two Products. By early September at the latest, they believed the Price Reductions had caused a decrease in Ultrapharm's GM% from FY17 to FY18. At the start of October 2018 Mr Randhawa asked Mr Leyton Scott to investigate changes in sales prices, referring him to the data supplied by Mr Stacey in the Spreadsheet but asking him to check that against the Sage data. At the beginning of November Mr Randhawa identified what he considered to be a £300k reduction in GM as a result of price reductions in "January 2018". It is unclear how this figure was identified. It cannot be from the Sage accounting system because the Sage system identifies the Price Reductions on 5.2.18 and 30.4.18 as opposed to in January. Therefore, given that Mr Scott was provided with the Spreadsheet, it seems likely that it was this that formed part of the basis for Mr Randhawa to identify an alleged impact of £300k from pricing.

78. It is suggested in the documents that on about 13 November 2018 Mr Randhawa informed Mr Staddon of price changes to the GF White and GF Seeded alleged to have taken place in January 2018 with a consequent £300k impact on Ultrapharm's profit. There is, however, no contemporaneous email supporting that date. It seems that Mr Randhawa had also mentioned it to Ms Turnbull at about the same time. Neither Ms Turnbull nor Mr Staddon appears to have been particularly concerned about the discovery, and there is no suggestion that either of them thought of a claim for breach of Warranty.

79. In preparation for the Ultrapharm Review Meeting on 22 November 2018 (the "**Review Meeting**") Mr Randhawa prepared a presentation entitled "Ultrapharm November Business update v.2". The presentation identified the alleged profit impact from price reductions alleged to have occurred in January 2018. In particular:

(1) The fifth slide showed a steady decline in profit, including an alleged impact from January 2018 price reductions, but no negative profit impact from the Price Reductions which had in fact occurred on 5.2.18 or 30.4.18.

(2) The sixth slide was a comparison between the first 10 months 2017 vs. the first 10 months of 2018 and showed a £734k reduction in profit over 10 months resulting in a loss of £250k. It identified 3 main drivers of this. The 3 drivers identified were: (i) "reduced price on M&S Seeded & White bread – January 2018 £300k"; (ii) "Bread Europe (Juvela) de-list – September 2017 £156k"; and (iii) a "labour rate change – November 2017 £130k".

80. The Review Meeting took place on 22 November 2018. It was attended by Mr Duffy, Mr Boyd, Mr Staddon, Ms Turnbull, Mr Randhawa and Marc Lewis. There is no evidence that the Price Reductions were discussed. Ms Turnbull gave a financial review presentation at the meeting in which she concluded that the P3 and P4 results for 2018 differed from the forecast results because the anticipated labour saving had not materialised.

81. Immediately following the meeting Mr Duffy raised the £300k price reduction with Mr Boyd. Mr Boyd said to Ms Turnbull that two questions had been asked, being: "did we know about this at the time of signing?" and "if not, did we have a warranty in the SPA that there have been no changes made to terms?". Mr Duffy's comments to Mr Boyd contained the first suggestion of a possible warranty claim. Mr Boyd instructed Ms Turnbull to investigate the position.

82. As part of that investigation Ms Turnbull emailed a series of questions to Mr Randhawa. By an email timed at 1358 on 23 November 2018, she asked him: "at what point did you become aware of the price reductions?". Mr Randhawa replied at 1534, stating that: "Marc dropped it on me **a couple of weeks ago** that he had to reduce the price because of pressure from Village Bakery but didn't quantify this. We followed up through Sage to understand the impact (emphasis supplied)". This was not correct.

83. Ms Turnbull produced and circulated an initial draft of the Ultrapharm Review Meeting minutes at 1044 on 23 November 2018. Mr Duffy responded to Ms Turnbull at 1641, saying that he wanted the minutes to be written as "an important factual record wrt [with respect to] discovery of the root causes for Pontypool profit deterioration – the non DD disclosed M&S price reduction being key". Mr Boyd said that he would need to think about it. Mr Duffy responded, saying that "It's tricky. We knew EBITDA was down to £1.6/7m due to Pontypool, however we were told it was due to extra shift costs, waste etc that were reversible. At no point were we told it was a price reduction which is not necessarily fixable given the threat of Village". His view was that if Marc Lewis had known about the Price Reductions "he should have

spelled it out under the disclosures as it's now obvious and material (potentially £3m+ of value)".

84. Ms Turnbull circulated a revised draft of the meeting minutes to Mr Duffy (cc'ing Mr Boyd and Mr Staddon) at 1225 on 26 November 2018. She said that she had included three additional points "following discussion with Simon [Staddon]". She did not include the Price Reductions in the draft.

85. Mr Duffy raised this, and made reference, to the potential for litigation:

> "… The other point that I would like Steve's view on is my comment about the £300k M&S price reduction. This was not disclosed in DD and has led to the spurious plan assumption that we could simply recover the previous levels of profitability by reversing the shift change. The minutes are silent on this and it may be important to log for any subsequent claim? …"

86. There followed a debate between Mr Boyd and Ms Turnbull. In response to a request from Ms Turnbull that he simply provide her with the wording that he wanted to include in the minute, Mr Boyd stated, in an email timed at 1718 on 26 November 2018:

> "…The slide I am referring to is page 5 of the deck where the operating profit is bridge from £484,000 profit to £250,000 loss. One of the biggest items is the £300,000 change to M&S terms. …
> I would insert a minute along the following lines:
> "The OP expectation versus the Finsbury model is currently a loss of £250,000, a reduction of £734,000. There are 3 items accounting for the majority of this decline being:
>
> > -A reduction in price to M&S, seeded & white bread of £300,000 (unknown)
> > -The sale of Bread Europe (Juvela), £156,000 and (known)
> > -Labour rate changes, £130,000 (known) …"

87. Ms Turnbull responded later that evening said that she did not agree with Mr Boyd's analysis, nor with the insertions to the minute that he had proposed should be included:

> "… the reason I'm confused is this – slide 5 is not referring to the Finsbury (Stamford) model at all – it's a comparison of the first 10 months of 2017 (January 2017 to October 2017) actuals with the first 10 months of 2018 (January 2018 to October 2018) actuals.
> The Finsbury (Stamford) model did take into account the loss of the bread Europe business because we were aware of it when we were building the model and we included the financial impact of this. As explained in the meeting, the main variance to the Finsbury (Stamford) model in P3 and P4 was the fact that the direct labour savings of £35k per month had not been realised.

> We used forecast figures from Marc for the M&S sales going forward so, although he didn't state explicitly that the price reduction had been made, it was effectively included in the model. This is the reason the figures for P3 and P4 only vary to the model by the labour amounts.
>
> That's not to say we don't have the right to a claim re the M&S reduction – we purchased Ultrapharm on a 1x sales basis so we could argue that the sales price should have been reduced by the amount of the reduction in sales. So we should perhaps have paid £19.7m rather than £20m. I disagree with your assertion that the value of the price reduction is £3m. I assume you have calculated this based on the 10x EBITDA multiple that we paid, but that 10x EBITDA was a consequence of the 1x sales. The purchase calculation was clearly agreed at 1x sales.
>
> Although I disagree with your minute below (for the reasons outlined above) I have amended the minutes as you requested (see attached). However perhaps I should hold off circulating them until you and I have had a chance to discuss this further tomorrow so that we're both on the same page ..."

88. Underwriters submitted that Ms Turnbull had correctly identified that Finsbury's pre-acquisition modelling, which incorporated forecasts from Mr Lewis, took into account the impact of the Price Reductions and that the variance with the model was in fact due to an expected labour saving not materialising, as Ms Turnbull had herself presented at the Ultrapharm Review Meeting. I agree. Ms Turnbull also reminded Mr Boyd that the purchase price was negotiated on a 1x sales basis, with the 10x EBITDA multiple being engineered to match it.

89. Mr Boyd was not, however, prepared to leave matters there. Mr Boyd replied to Ms Turnbull, saying:

> "… take a step back and consider what we are trying to achieve. The new news was a £300 giveaway to M&S. If we did not know about it the thinking is to preserve our position by making a record of it in the minutes. What we are trying to avoid is Marc saying we did know about it and now is the time to make the point and reserve our position. That is what this is about …".

90. Ms Turnbull appears to have tried to find a form of words which would satisfy Mr Boyd without recording something untrue. She suggested the minutes should record that:

> "… A discussion took place on the reasons behind the decline in expected profitability. The labour impact (rate and shift change) had previously been discussed with Stamford Partners prior to completion on 31 August 2018 but JR [Mr Randhawa] provided additional information which showed that the profit decline had been further exacerbated due to a reduction in sales price to

> M&S (implemented in January 2018 and April 2018). JR confirmed that the impact of this price reduction is £300k pa and that he informed SS and JT of this as soon as he became aware of it in early November 2018 ..."

91. Mr Boyd suggested that she might go further and amend the minutes again to state expressly that the Price Reductions had not been built into Finsbury's modelling. Ms Turnbull was not, however, prepared to say that. She told Mr Boyd again that the Price Reductions had been accounted for:

> "… Hi Steve, Let's discuss this when we meet. As per my email last night I believe it was built into our modelling (though not explicitly highlighted by Mark). The fact that the sales figures for the 2 months to P4 do not differ from the model (as I highlighted on Thursday) reinforce this (although we do need to do some more analysis). NSV [Net Sales Value] for the 2 periods is actually ahead of the model by £13k, if we were to say that 10 months of the M&S impact is £300k and it wasn't built into the model I would expect sales to be behind by £60k in the first 2 periods.
> The £60k variance vs the model is driven by the labour savings not coming through …"

92. When Ms Turnbull circulated the final version of the meeting minutes at 1131 the same morning, the minutes referred to the Price Reductions in the manner she had proposed. They did not include Mr Boyd's comment that the Price Reductions were not included in Finsbury's pre-acquisition modelling, presumably because he accepted that Ms Turnbull was correct. Despite Mr Boyd knowing that the Price Reductions had been built into the model, on 29 November Mr Boyd proposed they send a holding note to Marc Lewis so he could arm himself with the facts ahead of a further meeting in which Finsbury would be looking for a price refund.

93. On 30 November 2018, Ms Turnbull circulated the first draft of "Ultrapharm – Price Reduction Summary*"* which summarised the findings of the investigation she had been conducting. Under a heading "Impact on Finsbury Model of the Price Reduction*"* she stated:

> "… The Finsbury (formerly known as the Stamford) model was built up using forecast sales information provided by Marc Lewis. This included a revenue forecast for M&S from July 2018 to December 2018 which was provided on 21st June 2018.
> Although the price reduction was not explicitly referred to it is reasonable to assume that the forecast figures took this into account. …
>
> If the price reduction for M&S had not been included in the Finsbury model there would be a negative variance. Having analysed the YTD (P3/P4) it is clear that the current underperformance against the model is due to assumed labour savings not materialising, rather than a sales issue ..."

94. Mr Staddon reviewed this draft and advocated caution as to any claim, stating:

> "… This doesn't look as black and white as I thought, given the sales forecast appears to have the reduction built in. I think this needs careful consideration before we take it anywhere …"

95. Mr Duffy disagreed, saying:

> "… I see it differently. Marc clearly knew about the price reductions and indeed his sales forecast appears to reflect them. He did not however tell us about the price reductions, particularly important under the warranties disclosures despite him being clearly aware of them. This is illegal ..."

96. On 3 December 2018 Mr Boyd emailed Mr Duffy, Ms Turnbull and Mr Staddon with a plan to take the matter forward, commenting:

> "… In my view, if we did not know about this price reduction Marc should have told us under the warranties and by not doing so he is in breach of the warranties. At £414,000, this is a warranty claim of £4 million. A huge event in the insurance industry which the insurer will defend robustly …"

97. On 4 December 2018 Mr Boyd had dinner with Mr Lewis in Cardiff and confronted him with the Price Reductions. It is clear from the messages that Mr Boyd sent to the Workplace by Facebook ("**WbF**") Sherlock Warranty Group that Mr Lewis did not agree with the figures and that Mr Lewis considered Mr Randhawa and Mr Chu had been given access to the records before completion and that they knew about the price changes. Mr Boyd advised the group that they would need to rebut the assertion as to "why, if given unprecedented access to the accounting records beforehand we didn't find it*"*. He asked Ms Turnbull to clarify what Mr Randhawa and Mr Chu had been doing before Completion.

98. On 5 December 2018 Mr Chu emailed Ms Turnbull, saying that he had read through the Project Sherlock – Price Reduction Summary and he agreed with the conclusion. I take this to mean that he agreed with Ms Turnbull's conclusion that Finsbury's pre-acquisition forecasts had taken account of the Price Reductions.

99. Mr Chu then expressed that he was having difficulty "tying up" the price changes. He provided Ms Turnbull with a copy of the Spreadsheet which had been sent to him by Lewis Stacey at the meetings over 22/23 August 2018 and the Project Sherlock - Analysis presentation that he and Mr Randhawa had previously prepared. He said that they hadn't looked at sales in any detail and suggested that this was why the price reduction wasn't specifically mentioned. He did at the same time acknowledge that the margin impact assessment on slide 14 referred to this.

100. Ms Turnbull thanked Mr Chu and asked him to work with Mr Randhawa and Mr Scott to amend the Price Reduction Summary document to reflect the true situation. At 1322 on 5 December 2018 Mr Chu emailed an amended version of the M&S Price

Reduction Summary to Mr Randhawa saying that he had added a couple of paragraphs "… on what we knew at the time …" The relevant amendments were as follows [with bold emphasis and strikethrough denoting the new text]:-

> "… Following the acquisition of Ultrapharm on 31st August 2018 Jas Randhawa was tasked with the preparation of a profit improvement plan.
>
> **In November 2018** whilst preparing these figures, he became aware of **the true impact** ~~in November 2018 that~~ **of** a price reduction **that** had been agreed with M&S ..."
>
> "… It should be noted that in the final two weeks prior to acquisition completion, Jas Randhawa and David Chu carried out an initial review of the Pontypool site to assess operational improvement opportunities and in the process were given access to some pricing data. They were provided with details of pricing which had showed a price reduction to M&S for the seeded and white loaves (from £1.75 to £1.58) but these were not as significant as the subsequent findings. To mitigate the impact from a price reduction, Jas and David were informed that a value engineering exercise was also done at the time to reduce costs and these offset most of the price reduction and therefore mitigated most of the profit impact. The latest findings show that the price reduction is greater than originally disclosed and instead of EPD to reduce recipe costs, there has now in fact been an increase in overall costs ..."

101. I am satisfied that Mr Randhawa and Mr Chu discussed this draft because at 0906 on 6 December 2018 Mr Chu emailed Mr Randhawa a further version of the draft, saying that he had reworded it. The reworded version provided as follows:-

> "… It should be noted that in the final two weeks prior to acquisition completion, Jas Randhawa and David Chu carried out an initial review of the Pontypool site to assess operational improvement opportunities and in the process were given access to some pricing data **to help identify causes for recent profit decline.** They were provided with details of pricing which had showed a price reduction to M&S for the seeded and white loaves (from £1.75 to £1.58) but ~~these were not as significant as the subsequent findings~~ **were told that the impact of this on operating profit was minimal as** ~~. To mitigate the impact from a price reduction, Jas and David were informed that~~ a value engineering exercise was also done at the time to reduce costs and these offset most of the price reduction and therefore mitigated most of the profit impact. **The changes to the seeded loaf had in fact resulted in a high GM%. Given the questionable integrity of the data and based on the limited Information available at the time, this was dismissed as insignificant as a cause of the recent profit decline. The Stamford model had accurately reflected the reduced sales price going forward.**

> The latest findings show that the price reduction is greater than originally disclosed and instead of EPD to reduce recipe costs, there has now in fact been an increase in overall costs ..."

102. At 1627 that same afternoon Mr Chu sent a third amended version back to Ms Turnbull. Mr Chu's additional paragraph had been amended further, so that it read:

> "… It should be noted that in the final two weeks prior to acquisition completion, Jas Randhawa and David Chu carried out an initial review of the Pontypool site to assess operational improvement opportunities and in the process were given access to some pricing data to help identify causes for recent profit decline. They were provided with details of pricing which had showed a price reduction to M&S for the seeded and white loaves (from £1.75 to £1.58) but ~~these were not as significant as the subsequent findings~~ were told that the impact of this on operating profit was minimal as ~~. To mitigate the impact from a price reduction, Jas and David were informed that~~ a value engineering exercise was also done at the time to reduce costs and these offset most of the price reduction and therefore mitigated most of the profit impact. The changes to the seeded loaf had in fact resulted in a high GM%. **In contradiction to this, another set of data supplied showed that the sales price of these two products actually increased from the 6 months to Dec 17 vs 6 months to June 18.** Given the questionable integrity of the data and based on the limited information available at the time, this was dismissed as insignificant as a cause of the recent profit decline. The Stamford model had accurately reflected the reduced sales price going forward ..."

103. Ms Turnbull had forwarded Mr Chu's email of 5 December 2018 to Mr Staddon. She advised Mr Staddon that she could not see the price reductions referred to explicitly in the presentation and so she was comfortable with their original stance that Finsbury were not made aware of the price reduction and the impact (in £'s) that it had on the turnover. She relayed Mr Randhawa's comments that they had no access to any systems, but only to Marc Lewis, and that they only had a limited amount of time to discuss with him. She said that this was a "a bit of a red herring from Marc anyway as the onus was on him to disclose, not on us to discover".

104. Her email was forwarded to Mr Randhawa. He emailed Ms Turnbull and Mr Staddon at 2125 on saying that he felt a bit uncomfortable with the position and that he hoped he was not "being used as the scapegoat here!!". Mr Randhawa admitted that he had "asked the question if there had been any reductions in pricing and we were informed by Lewis that 2 skus[1] were reduced*"*. Although he did not specify when this had occurred, I find that this must have been during the course of the meetings on 22 and 23 August 2018.

[1] SKU = stock keeping unit.

105. On 6 December 2018 Ms Turnbull asked Mr Chu to consider an extract which Mr Scott had obtained from the Sage Accounting system, and which appeared to conflict with Mr Chu's figures. She also passed on that Mr Randhawa had said he had not seen the Spreadsheet previously, and asked Mr Chu whether that was true. Mr Chu's reply said that he did not have anything to support the figures and that he would be more comfortable with Mr Scott's figures, that the Spreadsheet was received on 23 August 2018, that he did not necessarily recall showing it to Mr Randhawa, but that he had shared the output with Mr Randhawa.

106. Ms Turnbull wished to have the position confirmed by Mr Randhawa as well, and she pressed him directly for an answer as to when he had first known of the Price Reductions. At 0949 on 7 December 2018 Mr Randhawa repeated what Mr Chu had said in his amendment to Ms Turnbull's document – i.e., that they knew about the Price Reductions but had understood the "*impact*" of the pricing changes only in November 2018.

107. Shortly thereafter, Ms Turnbull emailed Mr Randhawa and Mr Chu a further copy of her Price Reduction Summary document. In her covering email she said that she had just had a message from Mr Boyd that Marc Lewis was saying he **absolutely** shared the price decrease information with them both when discussing the month on month position. She requested that Mr Randhawa and Mr Chu respond to this with their "take on things" so she could share this with Mr Boyd when she spoke to him.

108. Mr Chu replied first, saying:

> "… Hi, Marc did share with **us** that there had been a price reduction but as your report shows, the numbers from Lewis showed that there was also a corresponding decrease in COS as well which I think should be made clearer in your report. There were incomplete/inaccurate and inconsistent data which given the time scale and the information available, we were not able to establish the true and full impact of the price decrease … (emphasis supplied)"

109. Mr Randhawa's reply followed a few minutes later:-

> "… Hi Julie, I asked the question if there had been any price reductions as part of the general conversations and was inform [sic] by Marc that there were two skus that were reduced however the COGS[2] had been reduced accordingly therefore no real impact on GM%.
> It was only November that he mentioned the pressure he was under from M&S. In Marc's own words, "Village were chasing his business and he had no choice but to reduce price otherwise Ultrapharm would lose the business to them!!"
> Please remember our sessions with Lewis were covert and we were acting as consultants. As stated before I don't recall seeing the pricing file. What was apparent at the time was the credibility of the data that Lewis was sharing with

2 Cost of Goods Sold.

> us. Please also remember he is the Head of Manufacturing and not the Financial Controller for the site …"

110. These developments were discussed by the wider WbF group:

> Mr Boyd: "Following a chat with Julie we are concluding that we have been given information by Lewis in support of the margin decline that contained info with different prices at that time and a year earlier. We discounted the accuracy of the report and used it as directional but it would not pass legal challenge. That said he still didn't flag it as a warranty disclosure. Question still to be asked of Jas and David is did they talk about it with Marc?... Or Lewis"
>
> Ms Turnbull: "David has just confirmed to me in an email that Marc did share [sic] Jas and him that there had been a price reduction. Sounds like no quantification was given and both Jas and David didn't see it as important as they were concentrating on the gross margin (which didn't change greatly despite the price reduction because the figures provided by Lewis also had a corresponding COGS reduction.) However, the point is that the price reduction information was shared with Finsbury in some format prior to completion."
>
> Mr Boyd: "I signed a letter as to existing knowledge by you, Jas and myself"
>
> Mr Duffy: "Not quite sure where this leaves us as it sounds like our DD missed the issue despite pricing info shared."
>
> Mr Boyd: "Yup. If we were told there is no case to answer."

111. At 11:21 that same morning Ms Turnbull emailed the third version of her "Price Reduction Summary" setting out a timeline of Mr Randhawa and Mr Chu's alleged knowledge. In the covering email she summarised matters as follows:

> "… -a spreadsheet was sent from Lewis to David on 23rd August 2018 which showed a price reduction for M&S (albeit the figures were incorrect)
>
> -It appears that Marc did mention price reductions to Jas and David but this was not expanded upon because there was an (incorrect as we now know) belief that COGS would reduce by a similar amount meaning that net margin was not actually materially affected by the reduction in price. This was clearly an incorrect assumption but is partially the reason that Marc, David and Jas did not raise any red flags – they were concentrating on the profit of the business rather than looking at the NSV in isolation …"

112. I conclude from these communications that Finsbury appreciated the significance of Mr Randhawa's knowledge of the Price Reductions, and that they also appreciated from Ms Turnbull's Price Reduction Summary – v3 that: (a) the Price Reductions had been taken into account by Finsbury's pre-acquisition forecasts; and that (b) the Recipe Change was being offset by savings in distribution costs.

113. On 22 January 2019 Finsbury (Mr Boyd) notified their claim under the Price Reduction Warranty ("**PRW**") to Underwriters. They estimated the annualised impact of the Price Reductions to be £414,167 and said that the total claim was likely to exceed £4 million. On 4 March 2019 Mr Chu sent Mr Randhawa an email in which he said that he had rewritten Ms Turnbull's Price Reduction Summary document at Mr Boyd's suggestion and had "… left all the other details of when or how or what. It should be down to [Underwriters'] own investigation to proof (sic) that we did or didn't know anything about it …"

The issues considered

Issue 1: Construction of the Trading Conditions Warranty

114. The first issue turns upon the true construction of the Trading Conditions Warranty ("**the TCW**") in the SPA. Is it, as Finsbury contend, sufficient for them to show that there has been a substantial or significant adverse change in the trading position of Ultrapharm or do they need instead to demonstrate that the impact of this change has been more than 20% of the total sales of Ultrapharm as Underwriters contend?

115. The applicable principles of contractual construction are not controversial. In summary:-

(1) The essential task is "… to determine what the parties meant by the language used, which involves ascertain what a reasonable person would have understood the parties to have meant …" per Lord Clarke in *Rainy Sky v Kookmin* [2011] 1 WLR 2900 at [14].

(2) The objective meaning of the language used in a contract *"*has to be assessed in light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [contract], (iii) the overall purpose of the clause and the [contract], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions' per Lord Neuberger in *Arnold v Britton* [2015] AC 1619 at [15].

(3) Words and phrases are not to be considered in narrow isolation: *"*... It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole …": *Wood v Capita Insurances Services Ltd* [2017] AC 1171 per Lord Hodge at [10]; and

(4) When looking at the wider commercial context, care must be taken to identify the correct context, as observed by Lord Neuberger in *Arnold v Britton* (above) at [19 & 20]: "… commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would

or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made …" and "... a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed …"

116. Finsbury submitted that the TCW contained five specific warranties:

(1) That there has "… Since the Accounts Date … been no material adverse change in the trading position of any of the Group Companies or their financial position, prospects or turnover; …"

(2) Then a separate warranty, introduced by the word 'and' which reads: "… Since the Accounts Date … no Group Company has had its business, profitability or prospects adversely affected by the loss of any customer representing more than 20% of the total sales of the Group Companies ...";

(3) This warranty is supplemented by an alternative to such an actual effect, introduced by the word 'and' towards the end of the paragraph: "… so far as the Warrantor is aware, there are no circumstances which are likely to give rise to any such effects …" (i.e. the loss of any customer representing more than 20% of total sales);

(4) A separate warranty, distinguished from the warranty mentioning the effect of lost customers by the word 'or,' which reads: "… Since the Accounts Date … no Group Company has had its business, profitability or prospects adversely affected … by any factor not affecting similar businesses to a like extent [i.e. equivalent to a 20% loss in sales], other than as a result of factors which have affected businesses in the same industry, in general …"; and

(5) The equivalent supplemental warranty as was given in respect of the lost customer effects: "… so far as the Warrantor is aware, there are no circumstances which are likely to give rise to any such effects …" (i.e. an impact on profitability or prospects equivalent to a 20% loss in sales but not caused by a lost customer).

117. Underwriters submitted that the TCW consists of a single warranty, divided into three parts and not into five sub-clauses. They say that:-

(1) First, the TCW is a single clause, which is to be construed as a whole, and with each part consistent with the other parts. It is wrong in principle to construe what is material in one part of the TCW ignoring what is specifically identified as the threshold of materiality in the other parts of the TCW.

(2) Secondly, there are no sub-clauses. Each part is of equal weight.

(3) Thirdly, whilst Underwriters accept that the TCW may be divided, as above, into the three specific warranties separated by the conjunction "and", the middle section is one specific warranty which promises that no Group Company has been affected by the loss of a customer "representing more than 20% of the total sales of the Group Companies" or any other factor "to a like extent", i.e. a revenue or

profit impact similar to that to be expected by a loss of more than 20% of Group sales. Finsbury accepts that "to a like extent" means "equivalent to a 20% loss in sales" but wrongly, and unnecessarily, seeks to turn the middle section into three separate warranties where it is various alternatives within a single warranty.

(4) Fourthly, the last part of the TCW applies to both the foregoing warranties (or all five if Finsbury are correct): "any such effects" refers back to the whole of the preceding warranty. There is no good reason for it not to refer back to the whole.

(5) Fifthly, the last part of the TCW is guarding against the non-disclosure of "circumstances" the Warrantor would know would have particularly serious effects on the business, equivalent to a loss of "more than 20% of the total sales of the Group Companies". That is the reason for such circumstances to be disclosed.

118. Both parties' submissions are compelling. The TCW is not well drafted. I consider, however, that upon a true construction of the TCW it provides

(1) a warranty that there has been no material adverse change in the trading position of Ultrapharm or in its turnover; and

(2) a separate warranty that there has been no loss of a customer representing more than 20% of Ultrapharm's total sales.

The separate warranty is concerned with the loss of a <u>customer</u> since the Accounts Date and not with a loss of custom or business. A loss of custom or business is dealt with by the first warranty. It is not suggested in the present case that Ultrapharm lost any customers during the relevant period.

119. What, therefore, is a material adverse change for the purposes of the TCW? The parties are agreed that there is no set meaning that has been ascribed to these words in the authorities. Similar words have been considered in the following recent cases: *Grupo Hotelero Urvasco SA v Carey Value Added SL* [2013] EWHC 1039 (Comm); *Decura IM Investments LLP v UBS AG London Branch* [2015] EWHC 171 (Comm); and *Travelport Ltd v WEX Inc* [2020] EWHC 2670 (Comm). In the *Decura IM* case Burnton J held, at [7] and [31] that a "*material adverse effect*" meant something that was <u>substantial</u> or <u>significant</u>, as opposed to something of a *de minimis* level. In the *Grupo Hotelero* case Blair J held at [364] that an adverse change would be material if it <u>significantly</u> affects the borrower's ability to repay the loan in question. In other cases, however, such as *Kitcatt & Ors v MMS UK Holdings Ltd and Ors* [2017] EWHC 675 (Comm), a material adverse impact was specifically defined, in *Kitcatt* as being at least 20% in the case of operating income and 10% in the case of revenue [196].

120. Are Underwriters correct to say that a material adverse change should exceed 20% of total group sales? Underwriters' submission is that a material adverse change necessarily means the loss of sums representing more than 20% of Ultrapharm's total sales. They say that the TCW indicates what is material within the clause, specifically a loss of more than 20% of group sales or an impact on profit to a like extent.

121. Finsbury say not and that it is wrong to read the 20% threshold across into the meaning of material adverse change. This, they submit, is because (1) the TCW identifies two separate categories of trading conditions and identifies different criteria by which a breach is to be established; (2) construing different categories as meaning the same thing would render the separate categories in the TCW meaningless; (3) if the parties to the SPA had wanted to quantify an adverse change as exceeding 20% they could have done so. Their decision not to do so is relevant to the construction of "material"; and (4) the quantification of all aspects of the warranty makes no commercial sense. It would assume that there is an inflexible link between profits and sales.

122. There is considerable force in some of Finsbury's submissions although I consider that they assume a more sophisticated level of draughtsmanship than was in fact deployed by those who drafted the clause (which included Mr Boyd). I should mention here that Underwriters sought to pray in aid some of the evidence that Mr Boyd gave with regard to the draughting of this clause and the intention that lay behind it. I regard this is irrelevant and inadmissible. I have ignored both Mr Boyd's evidence and Underwriters' submissions in relation to it.

123. I have concluded that material adverse change does not mean a loss of 20% in turnover. There are two separate warranties and separate criteria have been specified for each of them. I do not, on balance, consider that the 20% loss of sales identified in the second separate warranty can be used to define the material adverse change necessary for the first warranty.

124. I am, however, satisfied that a material adverse change since the account date must exceed 10% of the total group sales of Ultrapharm for the latter to be a breach of the TCW. This is to my mind a sufficiently significant or substantial change over the relevant period of 9 months.

Issue 2: Did the Recipe Change breach the TCW?

125. Finsbury contend that the Recipe Change was materially adverse because it had a 14% or a 9.5% impact upon the profitability of the two products affected by the change. It is said that these are substantial or significant impacts.

126. I have no hesitation in rejecting all claims founded upon the Recipe Change. I do so for three reasons.

127. First, the Recipe Change was both agreed and came into effect before the Accounts Date. The Recipe Change was agreed with M&S in June 2017. I agree with Underwriter's submission that Ultrapharm's trading position changed as from the date of the agreement even if the change would only come into effect some months thereafter. And even if that is not correct, I find that the Recipe Change came into effect before the Accounts Date. I am satisfied on the available evidence that the new

recipe for GF Seeded bread was being manufactured by at least 30 December 2017 and that for GF White bread was manufactured from 29 December 2017. According to the applicable M&S Terms (as discussed above) a binding contract between M&S and Ultrapharm came into being by those dates at the latest.

128. Secondly, the Recipe Change is not a material adverse change. I have already found that a material adverse change is one that exceeds 10% of the financial position or turnover of Ultrapharm. Finsbury have not given any evidence as to the financial effect of a recipe change to two of a number of products manufactured by Ultrapharm for M&S, although it appears that Ms Turnbull estimated on 7 December 2018 that it had caused a cost increase of £133,000. A reduction of 9.5% or 14% in the profitability of two products would not have amounted to anything like 10% of Ultrapharm's turnover. I do not consider that this effect on profitability amounts to a material adverse change.

129. Thirdly, I am persuaded by Underwriters that recipe changes are part of the ordinary course of a bakery's business and do not, without more, fall within the ambit of the TCW. Mr Stacey observed in his witness statement that it was not unusual for Ultrapharm to be asked by M&S to develop its recipes and that there had been seven changes in recipe since 2013. Such changes are not without more, in my view, material adverse changes.

Issue 3: Did the Price Reductions breach the TCW?

130. Price Reductions are specifically addressed in the Price Reductions Warranty ("**PRW**"). There is no reference to them in the TCW – this deals with changes in the trading position of Ultrapharm and their financial position, prospects and turnover. In the absence of a PRW a price reduction could arguably be brought within the TCW. There is, however, no need to do so given the presence of the PRW. Applying commercial common sense to the construction of the SPA shows that Price Reductions have been treated separately by the parties and that they have applied specific and separate criteria in order to evaluate whether there has been a breach of the PRW.

131. I do not consider that this issue arises.

Issue 4: Construction of the PRW

132. It is agreed that Price Reductions were offered or agreed to be offered by Ultrapharm to M&S in respect of the GF Seeded and GF White bread in October 2017 and that these price changes came into effect after the Accounts Date of 31 December 2017.

133. Finsbury submit that the PRW prohibits price reductions implemented after the Accounts Date, whether they were offered/agreed to be offered before or after that date. Underwriters disagree and say that the PRW is looking to the date on which the

price reduction is offered or agreed to be offered and not the date upon which it actually becomes effective. Each party contends that its construction is consistent with commercial common sense.

134. Finsbury contend that the commercial purpose of the warranty is to give the purchaser comfort that the true picture of Ultrapharm's position vis-à-vis its trade with customers is visible from the accounts prepared to the Accounts Date of 31 December 2017 and that there were no new changes in respect of the prices for Ultrapharm's goods for sale after the picture presented in those accounts. Finsbury say that if the sales price of Ultrapharm's goods was to change after the Accounts Date by reason of the delayed implementation of a side undertaking that was not visible in the accounts then this would violate the protection which the warranty is supposed to provide.

135. In support of this submission Finsbury draw my attention to clause 2.1.10, which warrants that Ultrapharm has not since the Accounts Date "… entered into any commitment, conditional or otherwise, to do any of the matters set out in paragraphs 2.1 to 2.1.9 (inclusive) …" They argue that if Underwriters' interpretation of the PRW is correct then it would render the warranty in clause 2.1.10 entirely speculative and absurd: it would prohibit commitments in the warranty period to agree or offer to agree price reductions in that same warranty period.

136. Underwriters for their part say that the natural meaning of the words favours their construction. They argue that there is no real ambiguity in the language, and that the point at which Ultrapharm offers the price reduction is when it either unliterally proposes it or agrees such a reduction. They further say that clause 2.1.10 provides no assistance to Finsbury.

137. I find Underwriters' argument to be compelling – it gives effect to the ordinary and natural meaning of the words. I do not agree with Finsbury's argument in relation to clause 2.1.10. I consider that the main purpose of the PRW is to prohibit commitments during the warranty period to agree or offer to agree price reductions whether in the warranty period or thereafter. As for Finsbury's point that the protection which the warranty was intended to provide would be violated this seems to me to make an assumption that is unwarranted. I consider that it is to be assumed that Finsbury, as purchasers, will have carried out all necessary due diligence prior to the Accounts Date. The clause is seeking to protect the position between the Accounts Date and the conclusion of the SPA – hence the key opening words "… Since the Accounts Date …". The SPA is not intended to be a panacea to resolve any unforeseen consequences of Finsbury's admittedly light touch approach to due diligence. I repeat the words of Lord Neuberger in *Arnold v Britton* at [20] that I have quoted above.

> "… a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the

> parties have agreed, not what the court thinks that they should have agreed …"

138. I consider that the PRW is directed at the date upon which the price reduction is offered or agreed to be offered and not the date upon which it actually becomes effective.

Issue 5: Did the Price Reductions breach the PRW?

139. For the reasons I have given in relation to Issue 4 above, I am satisfied that Ultrapharm did not breach the PRW.

140. This finding is enough to dispose of Finsbury's claim. What follows is written on the assumption that I am wrong in my analysis and that the PRW was breached.

Issue 6: If there was a breach of warranty, does the Knowledge Exception or Knowledge Exclusion Apply?

141. There was considerable debate about the scope of the knowledge provisions in the SPA and the Policy. The Knowledge Exception and the Knowledge Exclusion are worded differently. Under the Knowledge Exception in the SPA Ultrapharm will not be liable for a breach of warranty if Finsbury had actual knowledge of the circumstances of a warranty claim and Finsbury was actually aware that such circumstances would be reasonably likely to give rise to a warranty claim. "Actual Knowledge" is defined in the Policy Knowledge Exclusion as being the "actual personal knowledge of the relevant person". The parties are agreed that the relevant person for the purposes of this claim is Mr Randhawa.

142. The burden of proof is upon Finsbury to establish that Ultrapharm breached a warranty in the SPA. I will assume that Underwriters carry the burden of establishing actual knowledge on the part of Finsbury. The burden of proof is upon an underwriter where he seeks to rely upon an exception or exclusion clause in a policy: *Bond Air Services LD v Hill* [1955] 2 QB 417 at 426.

143. The main question that I have to determine is what information constitutes actual knowledge for the purposes of the SPA and to what extent, if any, this information needs to have been processed or evaluated by the relevant person before the 31 August 2018. Finsbury contends that that what needs to be established for the Exception or Exclusion to apply is that Mr Randhawa actually knew that the price reductions were ongoing and were implemented after the Accounts Date *and* that he knew that these would be reasonably likely to give rise to a Warranty Claim.

144. It is necessarily the case that Underwriters have to rely on the documentary and the oral evidence in order to establish that a transaction team member at Finsbury had actual knowledge that Ultrapharm had breached the PRW. Underwriters submit that

Mr Randhawa had actual knowledge of the circumstances of a warranty claim. In support of this they say that they have established on the evidence that:

(1) Mr Randhawa was the one who had specifically asked the question if there had been any Price Reductions and who was informed by Mr Lewis, the seller and warrantor, that there had been Price Reductions to two SKUs.

(2) Mr Randhawa was given access to and provided with the pricing data showing a price reduction to the seeded and white loaves (from £1.75 to £1.58). He was provided with that data in order to "help identify causes for recent profit decline*"*;

(3) Mr Chu and Mr Randhawa used the pricing and margin data that they were given in the Standard Costs Spreadsheet to produce the Project Sherlock Analysis presentation. They would have been discussing the preparation of the Project Sherlock Analysis document after the meeting on 23 August 2018;

(4) Mr Chu was using the price data in Mr Stacey's Std Costs Spreadsheet and the volume data in Mr Stacey's Planning Board to analyse the GM% change from FY17 to FY18. Mr Chu had been working on, and had probably performed that analysis and had identified a substantial (albeit directional) impact when on 29 August he sent Mr Randhawa the current version of the PowerPoint presentation with a blank slide to be populated but entitled "Std Costs/Margin". In his covering email Mr Chu suggested that he and Mr Randhawa go through the PowerPoint. Mr Randhawa accepted in evidence that each time Mr Chu sent him a presentation they would have gone through it together. Mr Chu admitted under cross-examination that he was informing Mr Randhawa of the work he was doing and keeping him up to date. It is likely that Mr Chu and Mr Randhawa discussed the impact of the Price Reduction during that update on 29 August. In particular:

  (a) There was a blank slide left for "Std Costs/Margin" and Mr Chu is likely to have discussed what was intended for that slide, and that he was analysing the change in GM from 2017 to 2018.

  (b) That is consistent with Mr Chu then following up, around 2 hours later, with Mr Stacey, explaining he was trying to analyse the GM% change from FY17 to FY18 and seeking an update to the Std Costs spreadsheet for that purpose. No response to that email has been disclosed.

  (c) When it was put to Mr Randhawa that he had had a discussion he replied that "the only work I was discussing with David was where did we get to with labour and waste and what is our analysis telling us*"*. That, Underwriters submit, is all part of the similar lie that Mr Randhawa had told with regard to whether he saw the Std Costs Spreadsheet – that Mr Randhawa in effect only saw and discussed documents which were not harmful to Finsbury's case. It was submitted that I should reject his evidence on this as self-serving and because his evidence as a whole is entirely unreliable. Mr Chu's evidence (at least before he backtracked from it) was that they *both* saw the pricing data. I was invited to accept this evidence.

(5) The output of the analysis, which was based entirely on the Spreadsheet and Planning Board, identifies a sales price change impacting GM by -0.5%. Whilst the written slide in the PowerPoint presentation may not have been shared with Mr Randhawa until just after completion on 9 September 2018, the relevant information certainly would have been, most probably at the same time as the update on 29 August. Mr Chu and Mr Randhawa's false evidence that Mr Randhawa was entirely unaware of this until after the completion date should be rejected in light of their complete unreliability in respect of what information they were given and discussed in August 2018. Underwriters rely in particular upon Mr Randhawa's lies about whether he was provided with and discussed the Std Costs Spreadsheet, and Mr Chu's lies about whether he was provided with volumes data.

145. Before considering these submissions, I should first mention the key witness who was not called to give evidence. This is Marc Lewis. He was initially named as one of Finsbury's witnesses although a witness statement was not in the event filed from him. Mr Stewart KC made the point that there is no property in a witness and Underwriters could always have called him themselves had they wished to do so. I consider this to be a wholly unrealistic submission in the context of this case. Mr Lewis was employed by Ultrapharm/Finsbury until March 2020. It seems not unlikely that he reached a similar arrangement with Finsbury to Ms Turnbull about making himself available to give evidence for Finsbury if required to do so. However that may be, he was asked by Mr Boyd on 4 December 2018 as to whether he had referred to any price reductions and he said that Mr Randhawa and Mr Chu had been given access to the records before completion and that they knew about the price changes. Finsbury have not drawn my attention to any reliable evidence to suggest that Mr Lewis was mistaken in what he told Mr Boyd.

146. I have already said that I am unable to accept the evidence of Mr Randhawa or Mr Chu except where it is consistent with the contemporaneous documents or with the inherent probabilities. I am satisfied that both of them gave untruthful evidence in support of Finsbury's claim. I have already found that they were told of the price reductions at the meetings on 22 and 23 August 2018 and that Mr Randhawa would have known that such price reductions would reduce revenues in absolute terms and would also reduce the margin of the two products. I am also satisfied that Underwriters' submissions as recorded in paragraph 144(1)-(4) above reflect my findings in relation to the evidence.

147. I reject Mr Randhawa's oral evidence to the effect that he was not aware of the terms of the SPA at the time. It is inconsistent with his written evidence and with the inherent probabilities. There nevertheless remains the question of whether Mr Randhawa was aware that the information he had was likely to give rise to a warranty claim under the Knowledge Exception or amounted to a breach under the Knowledge Exclusion. I do not believe that Mr Randhawa had express awareness of these facts at the relevant time because I do not consider that he gave them any particular thought

at that time. Had he done so, however, I consider that he would have, or at least should have, considered that these facts would have been reasonably likely to give rise to a warranty claim.

148. Finsbury say that this is insufficient to amount to the actual personal knowledge of Mr Randhawa. Underwriters submit that provided Mr Randhawa had all the facts available to him then Finsbury cannot say that he did not have actual knowledge. They say that he did not need to be told that 2 + 2 equalled 4 in the context of the clause. He simply needed to be provided with the data 2 + 2 i.e. provided with "the circumstances". Alternatively they say that actual knowledge must include Nelsonian knowledge or wilful blindness. It would lead to a commercially nonsensical position if Finsbury could say that even if Ultrapharm had provided a spreadsheet detailing the impact of the Price Reductions to Finsbury, but Finsbury had ignored the email or chosen not to open the attachment before completion, nevertheless Finsbury did not have actual knowledge for the purposes of the SPA. It must be, Underwriters argue, that given Mr Randhawa was given the amount of the discount of the Price Reduction and the sales volumes, he was given the requisite information which allowed him to calculate the materiality of the Price Reductions (as Mr Chu and Mr Randhawa did in the Project Sherlock Analysis document). Even if Mr Randhawa wilfully ignored that information and chose not to simply times volumes by the price reduction, he should nevertheless still be treated as having requisite knowledge of the alleged material change in trading position. Mr Stewart KC realistically accepted in his oral closing that if one is deliberately not seeing something the reality is that one is seeing it. He submitted that if I were come to the conclusion that Mr Randhawa knew full well that there was a price reduction and that it was, say, £400,000 then this would be Nelsonian blind eye knowledge. If, however, he did not have that knowledge because he hadn't been given it and he could not work it out then this is not Nelsonian blind eye knowledge.

149. I regard Mr Stewart KC's concession as realistic. I am satisfied that Mr Randhawa had sufficient information available to him for the Knowledge Exception to apply. His evidence was untruthful because, in my judgment, he recognised that his knowledge at the relevant time was fatal to Finsbury's case.

150. I find that if there was a breach of warranty then the Knowledge Exception applies.

Issue 7: Would Finsbury have purchased Ultrapharm for £20 million in any event?

151. I have taken this issue before Finsbury's original issues Nos. 7 and 8 because it seems sensible to consider causation first. Underwriters assert that Finsbury would have purchased Ultrapharm for £20 million even if they had been aware of a possible claim for breach of warranty in the £3-4 million range. They rely upon four broad submissions as follows:-

(1) First, Finsbury knew that Mr Lewis was not enthusiastic about the Acquisition and that if he was to sell his 'baby' he required £20m. Finsbury were prepared

to pay £20m because it required Ultrapharm. This is why the price was fixed at £20m throughout the process.

(2) Secondly, whilst Finsbury was aware of deteriorating profit at Pontypool, the EBITDA of Ultrapharm, particularly at Pontypool, was not of determinative importance to the acquisition and did not affect the purchase price. If Mr Randhawa had told Mr Boyd and Mr Duffy about the Price Reductions, or they had known about the Recipe Change, they would not have interfered with the deal, still less walked away;

(3) Thirdly, Mr Lewis would not have accepted a change to the purchase price in any event. Finsbury's options were to proceed at £20m or to walk away entirely; it was not prepared to do the latter;

(4) Fourthly, there is no reliable evidence to support Finsbury's assertion that it only progressed with the Acquisition because it thought the deterioration in profit at Pontypool was temporary and reversible.

152. Finsbury said that I should accept the evidence of Mr Boyd, who said in his first witness statement at [54] that if he had known that Ultrapharm's reduced profitability was principally attributable to price reductions and cost increase rather than what Finsbury believed were reversible operational problems he would have insisted on reducing the price that they paid at the multiple of EBITDA to price and that if Marc Lewis had insisted on sticking with the £20 million price he would unquestionably have walked away from the deal.

153. I will briefly deal with Underwriters' four broad submissions.

154. As to the first submission, I have already found that Finsbury made no effort to reduce the price or alter the deal because the reality was that £20 million was the price demanded, was the price which had been fixed from the beginning and was the price that represented the perceived value of Ultrapharm to Finsbury. Finsbury's lack of presence in the GF/Free From market was a matter of considerable concern to them and they, and their advisors Stamford, were anxious to stimulate interest in the stock and to remind investors that they were relevant. Ultrapharm were perceived as having the best GF recipes in the market and GF baking was difficult. Mr Lewis was not at any stage enthusiastic about the sale of Ultrapharm and I am satisfied that once he had been led to believe that Finsbury were prepared to pay 1 x sales for the business there was no basis for him to accept less. The price of £20 million was in fact hard-coded into Stamford's model.

155. As to the second submission, as my findings of fact show, Finsbury never sought to reduce the price even though EBITDA fell during the run-up to August 2018. Mr Boyd seemed at all times anxious to progress with the deal even though concerns had been raised by Mr Duffy and by Mr Staddon and he did not relay their concerns to the Board of Finsbury. I am satisfied that this was because he was determined to acquire Ultrapharm's recipes and production knowhow. He was even prepared to take on and

accept a risk that Pontypool's business with Ultrapharm's largest customer, M&S, might be lost.

156. As to the third submission, I am satisfied that Mr Lewis would not have accepted a reduction in price and that Finsbury would not have walked away from the deal. Both Mr Duffy and Mr Boyd said that an attempt to restructure the deal or to lower the purchase price would not be acceptable to Mr Lewis. It was the opinion of Mr Thornton of Stamford that "If your judgment is tinkering with the deal at all won't wash with Marc then I would be of the view you should do the deal rather than walk away". That opinion was accepted and acted upon by Finsbury.

157. As to the fourth submission, I find on the evidence that Finsbury did not decide to proceed with the purchase at £20 million because it thought that the profit deterioration was easily reversible. Mr Duffy admitted in oral evidence that EBITDA at the UK site was not going to recover to December 2017 levels and that it was "never planned to" and he was also clear that he did not necessarily believe Mr Lewis when he said the operational difficulties at Pontypool were reversible. Although Mr Randhawa and Mr Chu do not appear to have ever delivered the report that they prepared it is apparent from the document that only marginal improvements could be made at best.

158. It follows from my findings that I am unable to accept the evidence of Mr Boyd. I am satisfied that Finsbury would not have walked away and that they would have proceeded with the purchase of Ultrapharm at the agreed price of £20 million in any event. Finsbury are therefore unable to prove that they have suffered any loss.

Issue 8: What was the "as warranted value" of Ultrapharm as at 31 August 2018?

159. Given my conclusions that Finsbury's claim fails on both liability and causation quantum does not arise. I will deal with it briefly.

160. Finsbury submit that the *as warranted* value of Ultrapharm was £20 million as at 31 August 2018. The experts agree that the conventional way to value Ultrapharm is by taking a conventional run-rate EBITDA multiplied by an appropriate multiple. It is also agreed that the starting point for the value of that EBITDA is the figure which Stamford derived from their analysis of Ultrapharm immediately before purchase, which was £2,053,203.

161. Before I consider the way in which Finsbury put their case it is first appropriate to stress that they did not at the time seek to value Ultrapharm in the conventional way. They instead assessed the value of the company on a 1 x sales basis and treated the purchase price of Ultrapharm as fixed at £20 million. The Stamford model was not used to proactively value Ultrapharm but was instead used to retrospectively sense check the already agreed purchase price of £20 million. As I have already said, the purchase price of £20 million was hard-coded by Stamford into their model. Ms

Rawlin was criticised by Finsbury for drawing these matters to my attention in her reports. This criticism is in my judgment misplaced. She recognised in those reports that it was a matter for the Court to decide what the contemporaneous documents showed. It was, however, entirely proper for her to point up the apparent discrepancies between the way in which Ultrapharm's "value" was assessed at the time and the way in which their claim has been calculated in these proceedings.

162. I have come to the conclusion that there was no "as warranted" value for Ultrapharm at the time the company was sold to Finsbury.

163. The experts diverge in the way in which they assess the value of Ultrapharm. Mr Plaha says that EBITDA figure identified by Stamford does not need to be adjusted, whereas Ms Rawlin says that it does, and that the correct, adjusted, figure is £2,250,250. Mr Plaha assessed the appropriate multiplier at 9.74x, whereas Ms Rawlin says that it should be in the range of 7x-8x.

164. I will deal with the multiplier first. What Mr Plaha has done is to adopt a multiplier that produces a value of £20 million:

9.74 x £2,053,203 = £19,998.197.

The multiplier taken by Mr Plaha was that assumed by Stamford in their model. It was assumed by them because they had hard-coded the value of £20 million into that model. Mr Plaha justified his assessment by taking a number of listed comparators and making adjustments to them. He came up with a range of 9x to 10.1x.

165. Ms Rawlin took different comparators to Mr Plaha for the purposes of her assessment of the appropriate multiplier. I found it difficult to decide whose comparators are more likely to be accurate. Mr Duffy and Mr Boyd both said in evidence that the comparing of multiples for different businesses is not an easy exercise.

166. I have concluded that I should prefer the contemporaneous assessments of the advisors to the transaction. Gambit, Ultrapharm's own experts, used a multiplier of 7x when they were advising Mr Lewis. Stamford had advised Finsbury that an appropriate valuation for the Polish arm of Ultrapharm would be 8x. Poland was recognised at the time as being the stronger part of the business. If Pontypool were included this would necessarily bring down the multiplier. I consider that the correct multiplier was probably in the range of 7x to 8x.

167. Applying an average multiplier of 7.5x to the two assessments of Ultrapharm's EBITDA produces the following valuations:

7.5x £2,053,203 = £15,399,022
7.5x £2,250,250 = £16,876,875

168. I do not consider it to be necessary to determine which valuation of EBITDA is to be preferred.

Issue 9. What the actual value of Ultrapharm as at the date of purchase and what is Finsbury's loss on the purchase?

169. This issue does not arise in light of my findings under Issue 8 above. The actual value of Ultrapharm as assessed by Mr Plaha, £16,805,630, is within the range of values calculated under paragraph 167 above.

170. I should say that if I had found there to be a breach of warranty and I had considered that Finsbury had suffered loss as a result then I would have assessed damages in the way that Ms Turnbull did in her email to Mr Boyd on 26 November 2018. The purchase calculation was clearly agreed at 1x sales and so the sales price should have been reduced by the amount of the reduction in sales. This was assessed at £300,000 at the time. Finsbury have not, however, ever sought to put their case on this basis.

Conclusion

171. For the reasons I have given above I conclude that Finsbury is not entitled to the declaration of indemnity that it seeks or to the damages that it has claimed. I dismiss Finsbury's claim.

172. I am grateful to all counsel for their excellent written and oral submissions and for their compelling cross-examinations.